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IN THE
Supreme Court of the United States

THE PEOPLE OF THE STATE OF ILLINOIS
ex rel. JAMES E. RYAN, ATTORNEY GENERAL
OF THE STATE OF ILLINOIS,

Petitioner,

v.

TELEMARKETING ASSOCIATES, INC.,
RICHARD TROIA and ARMET, INC.,

Respondents.

On Writ of Certiorari to the Supreme Court of Illinois

BRIEF *AMICI CURIAE* OF THE COUNCIL OF BETTER BUSINESS BUREAUS, INC. AND THE BBB WISE GIVING ALLIANCE IN SUPPORT OF PETITIONER

STEVEN J. COLE
SENIOR VICE PRESIDENT
AND GENERAL COUNSEL
Counsel of Record

RICHARD WOODS
ASSISTANT GENERAL COUNSEL
COUNCIL OF
BETTER BUSINESS BUREAUS, INC.
4200 Wilson Boulevard
Arlington, VA 22203
(703) 276-0100

Attorneys for Amici Curiae

PRESS OF BYRON S. ADAMS ✦ WASHINGTON, D.C. ✦ 1-800-347-8208

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Consent to File

Consent to file this Brief *Amici Curiae* has been obtained from Petitioner and Respondents.

Interest of *Amici*[1]

The Council of Better Business Bureaus, Inc. (CBBB) is the non-profit "umbrella" organization for the 142 Better Business Bureaus throughout the United States and Canada. Supported by approximately 300,000 business members throughout North America, the BBB system is celebrating its 90th anniversary this year. It is widely regarded as the preeminent business-funded consumer protection and business self-regulation organization in North America. The Better Business Bureau (BBB) mission is "to promote and foster the highest ethical relationship between business and the public…."

The BBB Wise Giving Alliance (WGA) is a non-profit affiliate of CBBB, formed two years ago through a merger of the National Charities Information Bureau (NCIB)[2] and the CBBB's own Philanthropic Advisory Service (PAS). WGA's mission is to help donors make informed giving decisions.

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[1] Neither party's counsel authored any portion of this brief. No person or entity other than *amici* made any monetary contribution to the preparation or submission of this brief.

[2] NCIB was founded in New York in 1918 as the National Information Bureau (NIB) in response to the proliferation of World War I relief agencies and other war-related appeals. It was the first organization in the country to establish accountability standards for national charities and produce reports about individual charities stating whether or not the charities met those standards.

WGA is supported by individual donors, foundations, businesses and CBBB.

CBBB and its BBB network use a variety of tools to further our objectives. These include the establishment of voluntary codes of conduct for the business community, extensive consumer and business education and "alerts," reporting on the marketplace performance of several million businesses, and administering one of the largest out-of-court consumer dispute resolution programs in the world. For many decades the BBB system has also evaluated and reported to the public on national and local charities.[3]

The BBB system has more than 21 million instances of direct contact with consumers and donors each year. It has been our long-held view that ethical businesses and charities have an obligation to assure that their customers and contributors have accurate and complete information upon which purchase or donation decisions will be made.

WGA reports on the compliance with the *CBBB Standards for Charitable Solicitations* (hereafter *CBBB Standards*) of approximately 400 national charities, including VietNow, the charity on whose behalf Respondents solicit. WGA also

[3] Within 20 years of their creation, local BBBs were producing reports about charities in response to inquiries. In addition, BBBs issued "alerts" on questionable solicitation practices that came to their attention. Although the BBB did not evaluate charities in relation to standards at that time, the reports included much of the same program, financial and governing board information that still appears in BBB charity reports. The growth in appeals on behalf of servicemen and other affected groups after World War II placed a greater demand for charity information on the BBB system. Charity reporting in the BBB system, originally a response to the needs of businesses, became more public focused as a result of the growth of charitable solicitations through mass marketing, which prompted requests from individual donors for BBB evaluations.

publishes a quarterly magazine for donors, the *Better Business Bureau Wise Giving Guide*, with educational information and a comprehensive summary of charity evaluations, operates a web site visited by more than a million and a quarter visitors each year, and publishes many alerts and educational brochures.

Prior to the merger, NCIB and PAS shared national prominence on issues of charity accountability, fundraising practices and governance through their reviews of national charities. The consolidated organization is now the preeminent charity accountability mechanism in the nation, governed by a diverse Board consisting of leaders from the foundation, legal, Better Business Bureau, educational, and non-profit association sectors.

CBBB and WGA largely leave the briefing of the First Amendment issue in this case to the parties. Instead, we concentrate on *the donors' perspective*, which we think will illuminate these First Amendment issues and which has too often been overlooked.

This case is not solely about the power of state officials, the business needs of diverse charities and their fundraising agents, or the blending of commercial and issue-oriented speech. It is about donors, the tough choices they need to make, and whether the First Amendment may shield solicitors who keep from donors the information needed by them. We believe we can help to provide this important context for the Court's decision.

Summary of Argument

Amici believe that the First Amendment issue must be considered from the *donors'* perspective. The case is not about the extent of permissible regulation of charitable

solicitations. It is about the accuracy and completeness of information donors need to make informed giving decisions, and whether that information may be intentionally hidden from them without consequences.

Americans contribute substantial sums to charity each year. Donors come from every demographic group. Telemarketing and other direct marketing solicitations play a major role in persuading people to give.

Research conducted for WGA shows that many individuals are not confident when they decide whether to give or about whether a charity is legitimate or not, they want more information than is often made available to them, and they have difficulty finding it. However, donors are often trusting. A substantial number say they usually assume it is all right to give to a charity *unless* they have heard or read something that caused them to have doubts.

At the same time, donors have high expectations regarding charities' fundraising practices and use of donated funds. They expect and want most of their hard-earned money to be used for the charitable purposes that led them to give in the first place, and they want little spent on fundraising.

The commercial fundraisers in this case have contracted to be paid on a commission basis, retaining 83-90% of the amounts raised during the 10-year period of this litigation. According to WGA's evaluation of VietNow in 2001, the charity spent 91% of the amounts raised for fundraising, and only 3% on charitable programs. As a result of these practices and because of a failure to provide WGA other requested information about finances and governance, the charity failed to meet seven *CBBB Standards*, and could not be determined by WGA as to whether it met eight others. VietNow has one of the worst, if not the worst, performances

of all the charities reviewed by WGA under the use of funds and fundraising cost standards.

This case does not involve the regulation of charities or fundraisers. It is a civil lawsuit brought under the common law and statutory provisions applying fraud and misrepresentation principles to all businesses with no reference to any particular category of business.

Generally a fraud or deceptive practices suit requires a showing of a materially false statement or omission of a material fact, and intent that the consumer (or donor) rely on the statement. A misrepresentation or omission will be found material if the consumer/donor would have acted differently had he or she been aware of the false statement or the omission. The overall net impression of the statements is determinative as to whether there has been a misrepresentation or omission of material fact. These standards are used universally by state and federal consumer protection authorities, as well as the courts.

The allegations that Respondents sought contributions for a variety of relief programs for Vietnam veterans, in the context of donor trust, expectations about the percentage of funds that would go to the charity, and the amounts actually used for charitable purposes that were way out of line with expectations, could persuade a trier of fact that the solicitations were fraudulent. When viewed from the donors' perspective, most, if not all, of the considerations that underlay the Court's three previous solicitation cases are irrelevant in a fraud or deception civil lawsuit.

Moreover, the previous cases do not preclude allowing this case to be tried. The Court has recognized the states' interest in prosecuting charitable solicitation fraud. This case involves no across-the-board regulation of charities or their

fundraisers with respect to percentages of funds going to the charity, required permits, or compelled disclosures. Any additional disclosures that might be required in this case are necessitated by Respondents' own conduct, and are narrowly tailored to preventing fraud—they would not apply to all solicitors as a matter of course, or to any solicitations that in context are truthful and not out of line with expectations and norms.

Argument

A. The Marketplace for Donations: Who are the givers? What are their attitudes and concerns?

Americans are generous. In 2001, for example, it is estimated that individuals contributed more than $160 billion of the total $212 billion donated to charity, representing more than three-quarters of all charitable giving, *Giving USA 2002*, AAFRC Trust for Philanthropy, at 10 (hereafter "*Giving USA 2002*"), and that they contribute on average about $1600 per contributing household, *Giving and Volunteering in The United States, Executive Summary*, Independent Sector (2001) at p. 8 (hereafter "*Giving and Volunteering*"). Almost nine in ten households contribute. *BBB Wise Giving Alliance Donor Expectations Survey, Final Report, Sept. 2001*, Princeton Survey Research Associates, at 15;[4] *Giving and Volunteering* at 7. A substantial majority of those contributions were for secular organizations.[5]

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[4] The survey of 2003 adult Americans was conducted for WGA by Princeton Survey Research Associates in the spring of 2001. Hereafter cited as "*WGA/Princeton Research*." The Princeton research survey was conducted for WGA as part of its comprehensive post-merger review of the standards it applies in national charity reviews.

[5] The Princeton Survey found that 73% of households gave to secular causes, *id.* at 44; the *Giving USA 2002* survey pegged that proportion at almost 62%, *Giving USA 2002 at* 11.

The percentage of donors is high across all demographic groups, although it is higher among older people, the better educated and the more affluent. *WGA/Princeton Research* at 16. However, as might be anticipated by the extremely high percentage of givers overall, poorer households also participate in large numbers.[6] Indeed, low-income families give a higher proportion of their household incomes than more affluent families.[7]

Not surprisingly, telemarketing and direct mail solicitation for charities plays a major role in giving decisions. Close to 60% of all U.S. households were solicited in 2000. *Giving and Volunteering* at 11. People who are asked to give are more likely to give and to give more than those who give on their own. *Id* at 9.[8] Poorer and less educated citizens are frequently among those solicited.[9]

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[6] Last year, for example, more than three-quarters of households with income less than $25,000 gave, and almost 90% of those with incomes between $25,000 and $50,000 gave, at an average amount of $587 and $1,027 respectively. *Giving and Volunteering* at 7. This is consistent with the *WGA/Princeton Research* finding that 73% of households with income less than $30,000 were contributors. *WGA/Princeton Research* at 17.

[7] The average proportion of household income contributed by those contributors with incomes under $25,000 was 4.2%, compared to 3.1% for all households that contribute. *Giving and Volunteering* at 7.

[8] Those solicited gave an average of $1,945 per household, compared to $1,114 of the households not asked. *Ibid.*

[9] In 42% of households with incomes below $25,000 at least one member was solicited, and the same was true for 35% of households with the person solicited having less than a high school education. *Ibid.*

In the face of all this solicitation and giving, our research tells us that many individuals are not very confident when they decide whether to give. They want more information than they have and they do not always know where to get it. Some research findings pertinent to this case are illustrative:

- 70% say it is difficult to know whether a charity is legitimate, *id* at 17;
- 44% say it is difficult to find the information they want in making a giving decision, and those without a college education have more difficulty than college graduates, *WGA/Princeton Research* at 22;
- 50% say they would be "very likely" to get information they wanted from the charity itself, although again only 50% think that the charities provide enough information about their activities to help them decide about giving, *id* at 23;[10]
- only 32% feel very confident in their ability to evaluate charities, *id* at 17;
- those who seek out information to aid their giving want different types of information, but their highest priority is related to finances, including the percentage of donations that go to the charity's program, *id* at 20;[11] and

[10] The Better Business Bureau was the top choice among outside sources for obtaining information about charities, ahead of government agencies such as the attorneys general (42% "very likely" vs. 24% "very likely"), trailing only the charities themselves and family and friends (50% "very likely" and 47% "very likely," respectively). *Ibid.*

[11] Nearly half (48%) mentioned finances in response to an open-ended question asking them to describe in their own words the information they needed most, 20% mentioning the percent of a donation that goes for charitable programs as opposed to administration or other costs, and 28% responding more generally, referring to whether the donation is going to the proper place. After finances, information about the charity's mission

- 79% of all adults, not just the information seekers, responded to closed-end questions about their needs for informed giving by putting at the top of the list knowing what proportion of contributions goes to the charity's programs, *id* at 21.[12]

While 68% of respondents to the *WGA/Princeton Research* survey said that they ask questions or otherwise look elsewhere for information they need to make a donation decision, a finding that should be a concern to all of us is that *28% of households* say they usually *assume* it is all right to give to a charity *unless* they have heard or read something that caused them to have doubts. *Id* at 20. It would seem, then, that there is a significant proportion of our citizens who are solicited, including many of the poorer and less well educated, and who then make generous contributions based not on fact but on trusting assumptions about the charity.

In light of this research it is appropriate to ask just what *are* the expectations of donors regarding the charities that solicit their donations? There are three findings by *WGA/Princeton Research* that are most pertinent to this case:

- when asked how much of a charity's expenditures should go toward programs as opposed to administrative and fundraising costs, more than half (56%) said that *80% or more* should go to programs,

(20%), its legitimacy (13%) and whether it fills a real need (6%) were most frequently mentioned. *Ibid.*

[12] Almost eight out of ten (79%) said that how much charity spending goes towards programs as opposed to fundraising or administrative costs was very important to know, and almost as many (75%) agreed that making an annual report available with information on finances and activities was very important.

and more than eight in ten (85%) said *60% or more* of the expenditures should go to programs, *id* at 5;[13]

- consistently, 67% said that *no more than 20%* of charity spending should go for fundraising expenses, *ibid.*, and 35% would limit it to *no more than 10%, ibid;*[14] and
- 63% say they expect all or nearly all of the contributions to be used for current programs or near-term programs (rather than reserved for future needs), *id* at 10.

The picture is clear. Donors have high expectations and desires. They expect and want their hard-earned money to be used to serve the programs and activities that persuaded them to give in the first place. Yet they are often trusting and lack confidence in evaluating charity legitimacy and in obtaining the information needed to do so.

B. The Fundraisers, the Charity, and the WGA Evaluation

The corporate Respondents, Telemarketing Associates and Armet, are both commercial fundraising firms, 100% owned by the individual Respondent, who is also their president and sole director. Complaint, paras. 2-7. They have apparently solicited for VietNow under similar financial arrangements for at least the 10 years since the complaint was filed.

[13] The responses were as follows: don't know--3%; at least 50%--12%; at least 60%--8%; at least 70%--22%; at least 80%--25%; more than 80%--31%. *Ibid.*

[14] The responses were as follows: don't know--3%; no more than 10%--35%; no more than 20%--32%; no more than 30%--13%; no more than 40%--3%; no more than 50%--7%; "okay" if more than 50% goes to fundraising--7%. *Ibid.*

Allegations in the complaint and amended complaints are that for this entire period the Respondents received a commission of 83-90% of the donations received on behalf of VietNow. Complaint, para. 12; Amended Complaint, para. 67F. Commission compensation violates the ethics code of the major professional association of fundraisers. *Association of Fundraising Professionals International, Code of Ethical Principles and Standards of Professional Practice*, Paragraph 16.[15]

These complaint allegations are consistent with the information made available to WGA by VietNow in the course of its most recent evaluation of the charity in October 2001. See Appendix at A1-A7. WGA evaluates nationally-soliciting charities that generate a significant number of donor inquiries to WGA and/or local Better Business Bureaus. The national charities reviewed by WGA received more than $15 billion in contributions from all sources, representing more than 7% of all contributions to local and national charities in the United States.

The twenty-three *CBBB Standards* are broad, encompassing public accountability, governance, accuracy in solicitation,

[15] http://www.afpnet.org/content_documents/2002_AFP_Code_of_Ethics.pdf. AFP bases its position on its view that commissions violate the "private inurement" principle, i.e., no private financial gain from charitable resources. It believes that commission arrangements make the charity's long term interest secondary to the solicitor's; they jeopardize donor trust from possible undue pressure and reaction to learning that donations are commissioned; they foster self-interested conduct by solicitors without regard for donor intent; they discourage development of a cadre of capable charity volunteers; they can provide financial rewards without merit; and they may sacrifice long term donor interests for short term gain.
http://www.afpnet.org/tier3_cd.cfm?folder_id=899&content_item_id=1227 .

and use of funds. Appendix at A8-16.[16] These Standards reflect *donors'* concerns: Is the charity open and responsible? Are there disinterested people in charge? Are its appeals forthright? Are funds used prudently? To answer these questions, WGA looks at a range of documents and records: annual reports, financial statements, budgets, conflict of interest policies, and solicitations.

The Standards were developed and revised with substantial input from the non-profit sector, and generally enjoy wide support from that community as a reasonable benchmark for charity accountability. The breadth of the Standards indicates WGA's belief that there is no simple, single indicator of charity accountability.

According to the WGA report on VietNow, Appendix, A1-A7,[17] the charity for whom Respondents solicited, the charity failed to meet seven of the 23 *CBBB Standards*, *id* at A1, and WGA could not verify whether it met eight others because the charity did not furnish WGA upon its request complete information on VietNow's finances, solicitations and informational materials. *Id* at A4.[18] Of most relevance to

[16] CBBB's Standards were first developed in 1974, and later revised in 1977 and 1981, with the help of an advisory panel that included charitable organizations, corporate contributions executives, regulatory agencies, accountants and other philanthropic experts. The Standards have undergone a comprehensive revision based on the *WGA/Princeton Research* and the deliberations of a similar advisory panel. See note 24.

[17] Donors obtain WGA evaluation reports through our website, www.give.org, or by telephone or mail to WGA or local Better Business Bureaus throughout the nation, and WGA donors may obtain a comprehensive listing of the results of all of our reviews through a quarterly magazine we provide to them, the Better Business Bureau Wise Giving Guide.

[18] The standards for which compliance could not be verified pertained to matters as the truthfulness of solicitations, identification of the

this case, WGA found that the charity failed to meet several standards regarding the use of funds and fundraising practices. In particular, VietNow did not meet the standards requiring:

- that a reasonable percentage, at least 50%, of total income from all sources shall be applied to programs and activities directly related to the purposes for which the organization exists;
- that a reasonable percentage, at least 50%, of public contributions shall be applied to the programs and activities described in solicitations, in accordance with donor expectations;
- that fundraising costs shall be reasonable, not to exceed 35% of related contributions (i.e., contributions made pursuant to these solicitations); and
- that total fundraising and administrative costs shall be reasonable, not to exceed 50% of total income. *Id* at A3-A4, A11-A12.[19]

VietNow did not simply fail to meet these important standards -- it was not even close. In FY 2000 it had total income of $3,624,289 according to its IRS Form 990,[20] of

relationship of the solicitor to the charity and the programs and activities for which funds are requested, established controls over outside fundraising activities, conduct of fundraising without excessive pressure, and maintaining an active governing body.

[19] The other standards not met by VietNow also related to its finances. The charity failed to provide on request, as required, its annual report and an audited financial statement

[20] Form 990 is the annual information return required to be filed with the Internal Revenue Service by tax-exempt organizations (other than churches) with revenues exceeding $25,000.

which $3,604,348 was from direct public support. At the same time the charity's 990 shows that $3,286,348 was spent on fundraising and only $100,676 on programs. *Id* at A6-A7.

In other words, according to the charity's own filings, *only 3%* of VietNow's total income in FY 2000 was spent on programs, while *91%* was spent on fundraising, and *94%* on fundraising and administrative costs combined.[21] *Ibid.* Indeed, almost the same amount in that year was added to reserves, i.e., not used for current activities, as was spent on programs. *Ibid.* While the parties have heretofore focused on the 10-15% paid to the charity by the fundraisers, from the point of view of the donor's concerns about the ultimate uses of the donations, the fact that the charity spent on programs only about 20% of the paltry amount it received from its fundraisers is perhaps equally shocking and relevant.

[21] In the fundraising cases previously before the Court it was observed that fundraising also sometimes includes informational activities such as education and advocacy. When this is so, these education and advocacy activities would normally be shown as program expenses and not fundraising, because accounting standards allow appropriate cost allocation when there are documented joint cost activities. Because Respondents were paid on a commission basis, however, the accounting standards require *all* costs attributed to its fundraising appeals be characterized as fundraising. See AICPA, Statement of Position 98-02, Accounting for Costs of Activities of Not-for-Profit Organizations and State and Local Governmental Entities That Include Fund Raising, para. 10. The rationale for this is that in a commission situation "basing a majority of compensation on funds raised is persuasive evidence that the activity is a fund-raising activity." *Id at* para. C-14. We also note that the internal VietNow budgets provided to WGA in the course of its 1993 WGA evaluation show the expected proceeds of fundraising as a net income amount, and do not attribute any portion of the commission paid to Respondents as charitable programs.

VietNow's record is one of the worst of all the charities failing to meet either WGA's fundraising or use of funds standards.[22] Thirty-one charities (or only 10% of the 310 completed reviews) failed to meet the standard calling for no more than 35% of contributions to be spent on fundraising, and only 39 charities (or less than 13%) failed to meet the standard calling for at least 50% of total income to be spent on program activities. VietNow had the highest fundraising costs of the group, and the third lowest proportion of income spent on charitable programs.[23]

Moreover, VietNow's performance is truly an outlier when all charities reviewed by WGA are considered. Thus, the average proportion of contributions spent on fundraising for the reviewed charities was a modest 17%, and the median was only 12.6%. VietNow was the *only charity* WGA reviewed with fundraising costs exceeding 90%. Indeed, only 19 charities (or 6% of the total) had fundraising costs exceeding 50%, only 22 (7%) exceeded 40%, and only 36 (12%) exceeded 30%.

A similar overall picture emerges when charity program expenditures are analyzed. VietNow had the third lowest proportion of income spent on charitable programs. The average proportion of income spent for charitable programs for all reviewed charities was a very healthy 73%, and the median was 74% (contrasted to VietNow's 3% spent on

[22] Of the 440 charities for which WGA sought to do a review within the past two years, 192 or 62% of those that provided information met all 23 standards, 116 or 37% of those reviewed failed to meet at least one standard, an additional two could not be verified with respect to certain standards, 82 did not provide any of the requested information to WGA to allow a review, and 48 evaluations are in progress.

[23] The other two were at 1.4% and 2.6% respectively. Of these "worst three," VietNow raised the most funds from the public.

programs). Only 39 (13%) failed to meet the standard calling for program spending to amount to at least 50% of income, and only 27 (9%) spent less than 40% of income on programs.

Charity performance overall, then, is generally in reasonable accord with donor expectations. VietNow's, performance, in sharp contrast, falls far short of national charity performance that WGA observes in its reviews.[24]

In light of this performance, it is particularly pertinent that VietNow is precisely the sort of charity in which the public places trust. The research survey conducted for WGA asked respondents about thirteen different types of charities, and asked in general how much the respondents felt each type could be trusted. Veterans organizations came out third of those must trusted, behind only religious organizations and police and firefighter organizations, with 39% saying they trusted veterans organizations "a lot."[25]

[24] As mentioned, the *WGA/Princeton Research* was conducted, in part, to help WGA evaluate whether there ought to be further revisions to its standards to meet current needs. In fact, revisions have been approved by its Board and the CBBB Board, following an extensive public participation process, and are expected to be released to the public by the end of 2002 with implementation guides. There are a number of changes, but the one most pertinent to this case is the modification on the "use of funds" standard. In order to reflect more closely donor expectations as demonstrated by our research, the new standards will require charities to spend at least 65% of their total expenses on program activities. The current Standards require 50% of total *income* to be spent on programs. See Appendix, at A11.

[25] In fact, when combining the "a lot" and "somewhat" responses, veterans groups came in second, ahead of police and firefighters and only 3% behind churches and other religious organizations.

C. The Legal Framework: Fraud, Omissions and the "Trilogy"

1. Respondents' Representations That They Were Soliciting For Various Veterans' Programs Were Materially False In Light of the Very Small Amount That They Knew Would Actually Go To These Programs and the High Expectations They Knew Donors Have About How Their Donations Would Be Used

To begin with, it is important to recognize that, unlike the "charity and fundraiser regulation trilogy,"[26] this case does not concern the regulation of charities or fundraisers. No rules are invoked by the State regarding fundraising practices, the use of charitable donations, or procedures that must be used to obtain permission to solicit. Rather, this case involves a civil lawsuit brought under generally applicable common law and statutory principles of fraud, deception and misrepresentation that make no reference to any particular category of business.

The standards underlying these civil claims apply with equal force to automobile dealers, clothing retailers, online merchants, and commercial fundraisers. We think it crucial for the Court to recognize that the Respondents' alleged conduct, if proven at trial, would be the very sort of conduct that would likely get any business into serious trouble.

The Petitioner's complaint alleged that Respondents represented that a

[26] *Village of Schaumburg v. Citizens For a Better Environment*, 444 U.S. 620 (1980); *Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947 (1984); *Riley v. National Fed'n of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988).

> "significant amount of each dollar donated would be paid over to VietNow for its purposes while in fact the Defendants knew that under the contracts 15 cents or less of each dollar would be available to VietNow for its purposes."

Complaint, para. 34. Further, in the June 25, 1996 Amended Complaint, the Petitioner alleged that "[t]he fact that less than 17% of the contributions would be paid over to VietNow and that more than 83% would be used for fund raising and other expenses is a material fact." Amended Complaint, para. 67G.

Petitioner also submitted "Survey Affidavits" that bear on these allegations. These affidavits describe how Respondents solicited for veterans programs such as food baskets, agent orange relief, and aid to homeless veterans, and the affidavits uniformly affirm under penalties of law that the donors would not have contributed had they been aware of the small amounts that were to be given to VietNow for its charitable programs.

Based on these and other allegations, Petitioner charged civil common law fraud[27] and violations of several Illinois statutes, including the State's consumer fraud statute,[28]

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[27] An action for common law fraud in Illinois requires proof of a knowing false statement and intended reliance by the recipient. *See, e.g.*, *Connick v. Suzuki Motor Co., Ltd.*, 174 Ill. 2d 482, 496; 675 N.E.2d 584, 591 (Ill. 1996). One who by a fraudulent misrepresentation intentionally induces another to make a gift to him or a third person is also subject to liability. Restatement (Second) of Torts § 553 (1977) (hereinafter Restatement 2d Torts).

[28] The State statute provides:

which is comparable to the consumer protection laws in all 50 states. In typical circumstances these allegations would require a trial to determine if the misrepresentations were made or the omissions were in fact material as pled. There is a large body of law at the state and federal levels that provides guidance to the courts and triers of fact on these issues.

Generally, at common law, a misrepresentation or omission will be found material if the plaintiff would have acted differently had he been aware of the false statement, or if it concerned the type of information upon which he would be expected to rely when making his decision to act. *Miller v. William Chevrolet/Geo, Inc.*, 326 Ill. App. 3d 642, 649; 762 N.E.2d 1, 7 (Ill. App. 2001); See also Restatement 2d Torts § 539(2). A representation that is technically true may be fraudulent if it suggests something that is false, *In re Witt*, 145 Ill. 2d 380, 390, 583 N.E.2d 526, 531 (Ill. 1991), or omits qualifying material, *Brown v. Broadway Perryville Lumber Co.*, 156 Ill. App. 3d 16, 23, 508 N.E.2d 1170, 1175 (Ill. App. 1987), "for a half-truth is sometimes more misleading than an outright lie." *Ibid.* See also Restatement 2d Torts § 529 (a truthful statement that the maker knows or believes to be materially misleading because it is incomplete is a fraudulent misrepresentation) and comment b (the recipient is entitled to know the undisclosed facts if they are material).

> Unfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use or employment of any deception fraud, false pretense, false promise, misrepresentation *or the concealment, suppression or omission of any material fact*, with the intent that others rely upon the concealment, suppression or omission of such material fact…in the conduct of any trade or commerce are hereby declared unlawful whether any person has in fact been misled, deceived or damaged thereby…." 815 ILCS 505/2 [emphasis supplied.]

The standard of materiality under the Illinois Consumer Fraud Act is essentially the same as under the common law. *See, e.g., Connick v. Suzuki Motor Co., supra.* In addition, that statute, like many of the "mini-FTC Acts" throughout the nation, incorporates Federal Trade Commission and federal court interpretations under the Federal Trade Commission Act, which are also instructive.[29]

The FTC will consider an advertisement or other marketing practice deceptive if there is a representation, omission, or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment.[30] An omission may be deceptive where the representations made are not literally misleading but create a reasonable expectation or belief among consumers that is misleading absent the omitted disclosure. Deception Policy Statement at 175 n.4. An omission can be deceptive if the advertiser or marketer tells only half the truth and omits the rest – for example when a seller "fails to disclose qualifying information necessary to prevent one of his affirmative statements from creating a misleading impression." *International Harvester Co.*, 104 F.T.C. 949, 949, 1057 (1984); *Federal Trade Commission v. Sterling Drug, Inc.*, 317 F.2d 669, 675 (2d Cir. 1963). An omission can also be deceptive if a seller remains silent under circumstances that

[29] Section 5, 15 U.S.C. §45, declares unlawful unfair and deceptive practices in interstate commerce. In determining whether a practice is unfair or deceptive, Illinois state courts look not only at the particular practices that the Federal Trade Commission has identified as unfair or deceptive, but also more broadly at the standard the Commission employs in deciding what is an unfair or deceptive practice. *Heastie v. Community Bank*, 727 F. Supp. 1133, 1138 (N.D. Ill. 1989).

[30] Letter from James C. Miller II' to Congressman John D. Dingell (Oct. 14, 1983), appended to *Cliffdale Associates, Inc.*, 103 F.T.C. 110 (1984) (hereinafter "Deception Policy Statement").

constitute an implied but false representation – such as when representations are "based on ordinary consumer expectations" about the subject matter of the transaction. *International Harvester Co.*, 104 F.T.C. at 1058.[31]

A generous reading of the complaint, required in the context of a motion to dismiss, together with appropriate regard for the contributions marketplace in which the solicitations by Respondents occurred, strongly demonstrates that the representations made in this case were misrepresentations under common law and the deceptive practice statute. Thus, as discussed above, the solicitations here have occurred in an environment where many donors are trusting, and expect that *most of their contribution* will benefit the charitable activities they wish to support. At the same time, the commission-based contracts that were used to distribute the collected funds provided only a small fraction of donations to the charity, an amount that falls *woefully short* of both donor expectations *and* industry practices and ethical standards. Respondents surely and intentionally created a false but reasonable expectation by donors about their support for the charitable programs of VietNow.

[31] The BBB Code of Advertising, a voluntary standard widely followed by the business community and often used as a model for state and federal guidelines, similarly provides that "An advertisement as a whole may be misleading although every sentence separately considered is literally true. Misrepresentation may result not only from direct statements but by omitting or obscuring a material fact." http://www.bbb.org/advertising/adcode.asp#Basic%20Principles, para. 3. The *CBBB Standards* also provide that charities must "[e]nsure that solicitations and informational materials, distributed by any means, are accurate, truthful and not misleading, both in whole or in part." Appendix , at A12.

2. The Considerations Regarding the Impact of Regulation On Charitable Solicitation Underlying Schaumburg, Munson and Riley Are Not Relevant to This Civil Fraud Lawsuit

When the issues are viewed from the donors' vantage point, most, if not all, of the considerations that led to the "trilogy" decisions become irrelevant in a fraud or deceptive practices lawsuit.

For example, while it is true that donors expect that *some* portion of their contributions will be used to pay the cost of solicitation, *Riley* 487 U.S. at 799, it is not reasonable to expect that they would ever imagine that it would be 91%. Clearly, statements made in the solicitations here created reasonable expectations by donors that significant portions of their donations would benefit the charitable programs. Respondents *knew that these expectations were not to be fulfilled*, yet they remained silent, thereby maintaining the false impression they created. A trier of fact might therefore reasonably conclude that the donations to benefit specific veterans relief programs were induced by misrepresentations, or at least the intentional withholding of information that surely would have made a difference to the donors in making their decisions to contribute.

In this regard, this Court and the Illinois Supreme Court have observed that it would be wrong to assume that fundraising companies accomplish no charitable purposes with the proceeds they retained. *See Munson*, 476 U.S. at 963; *Schaumburg*, 444 U.S. at 635; *Riley*, 487 U.S. at 798-99; *People ex rel. Ryan v. Telemarketing Associates, Inc.*, 198 Ill. 2d 345, 359-60; 763 N.E.2d 289, 297-98 (2001). However, whatever might be the situation in other arrangements, and notwithstanding the contract terms in this case, according to the information provided to the IRS and

additional information provided to WGA, VietNow did not claim that *any* of the fundraising expenses were devoted to program activities. *See supra* at 14.

In any event, the amounts *actually* used for charitable programs by this charity, either directly or through the efforts of respondents, is a question of fact that goes to the issue of materiality, i.e., were the representations or omissions truly out of step with donor expectations? Materiality questions are properly determined at trial, with Petitioner shouldering the burden of proof, and not resolved on a motion to dismiss on First Amendment grounds.

The Court previously has also observed that a compelled unfavorable disclosure would have the "predictable result" of making the solicitation unsuccessful because the donor would close the door or hang up. *Riley*, 487 U.S. at 800. In the context of a fraud prosecution, however, and looking at the situation from the donors' point of view, this possibility loses its relevance.

If, indeed, a disclosure is needed to make the remainder of the solicitation truthful, it should be of no consequence that the donor might terminate the conversation. Materiality is determined by what reasonably matters to the recipient of the solicitation or other marketing call, see *supra* at 19-21, and does not depend on the recipient having a viewpoint favorable to the marketer. As we have seen, it is very likely that the amounts going for charitable programs are so marginal in this case that they would indeed have mattered a great deal to most of the donors who have difficult choices to make as to where they wish their donations to be directed. Withholding the whole truth in order to keep the prospect alive is surely not an acceptable alternative, and is not one ever previously held to be sanctioned by the First Amendment.

Nor is it relevant that in some instances the high fundraising costs may have some explanation or justification, or that the charity might actually derive some benefit from its arrangement. Donors should be able to decide for themselves, after receiving all material information, how to allocate their donation dollars. Some donors will likely choose to support new charities or activities or unpopular causes, willing to sacrifice efficiency because of an affinity with these charitable activities. Others might prefer to stick with established charities, or proven successful ones. Still others may make decisions reflecting different values in different situations. In any event the choice must be the donors', based on accurate information, and not the State's, the charity's, the fundraisers', or the courts'.[32]

It is also not an answer, in this case, to say that donors can always *ask* how much will go to the charity or how high fundraising costs may be. *See Riley*, 487 U.S. at 799. Many donors are likely to be unsophisticated and even intimidated by the telemarketer, or may be embarrassed to ask such probing questions of a charity representative, and will not ask. The very nature of a telemarketing call is that it provides little opportunity for reflection and analysis. We also know that many are trusting.

As importantly, however, donor expectations may make many donors feel that asking is irrelevant. Donors may not want to draw fine lines as to allocation percentages in making giving decisions, so long as the charity's situation is

[32] Similarly, that VietNow might like the deal it negotiated, compare *Riley*, 487 U.S. at 798, is not important or even relevant to a donor. The relevant question is whether accurate information would have affected the donors' contribution decisions, and not whether the charity might benefit from its arrangement with Respondents.

within an acceptable range. Donation decisions are, after all, based on a large number of factors, including the charity's mission and its accomplishments. It is only when the allocation is far out of line that the information becomes material, and may need to be disclosed to withstand a fraud charge.

3. Prior Cases Do Not Bar a Trial of This Lawsuit

We do not believe that any of the previous charitable solicitation cases, including *Riley*, requires that the First Amendment be an absolute bar to a trial of the fraud allegations in this case.

First, each of the Court's prior cases recognized that the states have a legitimate interest in prosecuting fraud by charitable solicitors. *Riley*, 487 U.S. at 800; *Village of Schaumburg*, 444 U.S. at 637-38; *Munson* 467 U.S. at 967. Of course, fraud and other false statements have never been protected by the First Amendment. *See, e.g., McIntyre v. Ohio Elections Comm'n.*, 514 U.S. 334, 357 (1995). "Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (citation omitted). False representations that arise from the context, whether or not they flow from specific false statements of facts, similarly do not enjoy First Amendment "immunity." *See, e.g., Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19 (1990); *Levinsky's, Inc. v. Wal-Mart Stores*, 127 F.3d 122, 127 (1st. Cir. 1997); *Toney v. WCCO TV*, 85 F.3d 383, 387 (8th Cir. 1996).

Second, as noted, charitable solicitations are not being regulated in this case. There is no prohibition of solicitation based on the percentage remaining for charitable uses, no

license or permit required, and no compelled disclosure.[33] Fundraising business practices are not jeopardized by standards that require only truth telling, and that means the whole truth.

For example, across-the-board regulation has been seen as an impediment to legitimate practices such as acquisition mailings, i.e., appeals made to individuals who are not previous donors, which often have a low return after costs but a positive long-term payoff. *See Riley*, 487 U.S. at 792. Similarly, it has been argued that such regulation might inadvertently punish unsuccessful appeals made in good faith or new or unpopular charities with high fundraising costs. *Id* at 799. Neither of these arguments is pertinent to this case.

Again, there is no universally applicable regulation at issue in this case and the cause here is one of the most popular. *See supra* at 16. In addition, the proportion made available to VietNow for the causes for which the solicitations were made is fixed by contract and does not vary by the success or lack of success for the appeal.[34] This is a far different situation than a particular appeal by a charity that turns out unsuccessful for any number of legitimate reasons, or where the costs of a particular appeal are known in advance to be high but the total funds available to support charitable programs overall are well within reasonable donor

[33] WGA similarly has not asked charities to make routine disclosures of fundraising costs or the percentage of donations used for programs. WGA believes that such disclosure on a routine basis would be unnecessary, and where the percentages are below donor expectations as reflected in our standards, the charity would fail to meet our standards in any event.

[34] Those contracts have remained in place for at least a decade without significant revision to reflect any changing circumstances for the charity and its donors.

expectations. In such situations, representations that donations would benefit charitable activities would be materially accurate and not subject to fraud actions.

Third, the disclosures that might be required in this case to prevent *actual* fraud do not have the reach of the regulatory requirements in *Riley*. Unlike in *Riley*, they are not required of all solicitors, routinely, but *only* in an individual case where the failure of the solicitor to make the disclosure would render other statements misleading under all of the circumstances. Charities and fundraisers whose practices are not so out of line with donor expectations and the marketplace need fear no burden on their rights to solicit.

Fourth, the information intentionally withheld from donors in this case--information that should have been disclosed to provide the whole truth-- is *precisely related* to the very solicitation in question. It involves the very donation being sought, for the charity in question, and not some overbroad proxy designed to protect against possible fraud. Contrast *Riley*, 487 U.S. at 800, n.12.[35]

In the end, this is really a rather straightforward fraud and deception case. The Petitioner is not, as the states were in the "trilogy" cases, exercising an interest to protect charities and donors from potential harms that might *possibly* be visited on them by *some* over-reaching solicitors. Nor is the Petitioner using blunt proxies to ferret out those potential harms at the expense of First Amendment rights of non-

[35] In *Riley* the disclosure required of all professional fundraisers before the appeal was made was the percentage of charitable contributions collected during the previous year that were turned over to charity. As the Chief Justice noted, that information was "only a very rough surrogate for the percentage of collections which will be turned over by the fundraiser in the particular drive in question." *Id* at 811 (Rehnquist, dissenting). Here, the information concealed was about the very drive in question.

fraudulent fundraisers. Petitioner is simply seeking to enjoin fraud perpetrated against donors that the facts show to have occurred in solicitations by the Respondents. This must be the Court's focus as it applies First Amendment principles.

Conclusion

The judgment below should be reversed, and the case remanded for trial.

Respectfully submitted,

STEVEN J. COLE
Senior Vice President and General Counsel

RICHARD WOODS
Assistant General Counsel
Council of Better Business Bureaus, Inc.
4200 Wilson Boulevard
Arlington, VA 22203
(703) 276-0100

Attorneys for *Amici Curiae*

BBB Wise Giving Alliance
Charity Report

VietNow ***October 2001***
1835 Broadway
Rockford, IL 61104-5409
815-227-5100
800-837-8669
www.vietnow.com Expiration Date: October 2003

Year, State Incorporated: 1984, Illinois
Affiliates: 21 chapters
Stated Purpose: "to be a veterans organization of past and present members of the United States Armed Forces, to keep the lines of communication open to all individuals of the organization and their families, to promote awareness of all veterans' issues."

EVALUATION CONCLUSIONS

VietNow does not meet the following 7 CBBB Standard(s) for Charitable Solicitations:

A1 -- Soliciting organizations shall provide on request an annual report. The annual report, an annually-updated written account, shall present the organization's purposes; descriptions of overall programs, activities, and accomplishments; eligibility to receive deductible contributions; information about the governing body and structure; and information about financial activities and financial position.

The Alliance requested, but did not receive, a current annual report from VietNow.

A2 -- Soliciting organizations shall provide on request complete annual financial statements. The financial statements shall present the overall financial activities and financial position of the organization, shall be prepared in accordance with generally accepted accounting principles and reporting practices, and shall include the auditor's or treasurer's report, notes and any supplementary schedules. When total annual income exceeds $100,000, the financial statements shall be audited in accordance with generally accepted auditing standards.

In response to a request by the Alliance for a copy of VietNow's audited financial statements, the organization provided a copy of its fiscal year 2000 IRS Form 990, which, among other things, has not been audited by an independent certified public accountant.

A3 -- Soliciting organizations' financial statements shall present adequate information to serve as a basis for informed decisions. Information needed as a basis for informed decisions generally includes, but is not limited to: a) significant categories of contributions and other income; b) expenses reported in categories corresponding to the descriptions of major programs and activities contained in the annual report, solicitations, and other informational materials; c) a detailed schedule of expenses by natural classification (e.g., salaries, employee benefits, occupancy, postage, etc.), presenting the natural expenses incurred for each major program and supporting activity; d) accurate presentation of all fund raising and administrative costs; and e) when a significant activity combines fund raising and one or more other purposes (e.g., door-to-door canvassing combining fund raising and social advocacy, or television broadcasts combining fund raising and religious ministry, or a direct mail campaign combining fund

raising and public education), the financial statements shall specify the total cost of the multi-purpose activity and the basis for allocating its costs.

In response to the Alliance's request for a copy of VietNow's most current audited financial statements, VietNow provided a copy of its IRS Form 990 for the fiscal year ended June 30, 2000.

VietNow's IRS Form 990 for the fiscal year ended June 30, 2000, did not present expenses incurred for each of VietNow's major programs (i.e., public awareness and education, advocacy, and veterans assistance). In addition, it did not include a detailed schedule of expenses by natural classification (e.g., salaries, postage, etc.), presenting the natural expenses incurred for each program service and supporting activity (i.e., fund raising and administration).

B1 -- A reasonable percentage, at least 50%, of total income from all sources shall be applied to programs and activities directly related to the purposes for which the organization exists.

According to its IRS Form 990 for the fiscal year ended June 30, 2000, VietNow spent $100,676, or 3%, of its total income ($3,624,289) on program expenses.

B2 -- A reasonable percentage, at least 50%, of public contributions shall be applied to the programs and activities described in solicitations, in accordance with donor expectations.

According to its IRS Form 990 for the fiscal year ended June 30, 2000, VietNow spent $100,676, or 3%, of its total public contributions ($3,610,574) on the programs and activities described in its solicitations.

B3 -- Fund raising costs shall be reasonable, not to exceed 35% of related contributions.

According to its IRS Form 990 for the fiscal year ended

June 30, 2000, VietNow's fund raising costs were $3,286,348, or 91%, of related contributions ($3,610,574). (Related contributions are donations received as a result of fund raising activities).

B4 -- Total fund raising and administrative costs shall be reasonable, not to exceed 50% of total income.

According to its IRS Form 990 for the fiscal year ended June 30, 2000, VietNow's total fund raising and administrative costs were $3,395,979, or 94%, of total income ($3,624,289).

In addition, the BBB Wise Giving Alliance requested, but did not receive, complete information on VietNow's finances, solicitations and informational materials, fund raising practices, and governance, and therefore, is unable to verify VietNow's compliance with the following 8 CBBB Standards for Charitable Solicitations (see [Appendix at A8] for description of standards): A4, C1, C3, C4, D1, D2, D4, and E2.

VietNow meets the remaining 8 CBBB Standards for Charitable Solicitations.

PROGRAMS

VietNow is a membership organization extended to those veterans serving in the United States armed forces since 1957. Members participate in awareness activities and advocacy which address veteran issues such as POW/MIA's, harmful affects of Agent Orange, and homeless veterans. The organization also lobbies legislators to reduce spending cuts in veteran's benefits. Members volunteer in VA hospitals and try to block VA spending reductions. VietNow also offers programs assisting veterans suffering from Post

Traumatic Stress Disorder. In addition, VietNow works to uncover more information on the affects of the Gulf War Illness.

For the fiscal year ended June 30, 2000, VietNow's program expenses were:

Program services	100,676
Total Program Expenses	**$100,676**

GOVERNANCE

Chief Executive Officer: Rich Sanders, President
Compensation*: $0
Highest Paid Executive: Not provided
Compensation*: Not provided
Chair of the Board: Rich Sanders
Chair's Profession / Business Affiliation: Not provided
Board Size: 8
Paid Staff Size: 1
* July 1, 1999 - June 30, 2000; compensation includes annual salary and, if applicable, benefit plans, expense accounts, and other allowances.

FUND RAISING

Method(s) used: Telemarketing and Internet appeals.
Fund raising costs were 91% of related contributions. (Related contributions, which totaled $3,610,574, are donations received as a result of fund raising activities.)

TAX STATUS

This organization is tax-exempt as a veterans organization under section 501(c)(19) of the Internal Revenue Code. It is

eligible to receive tax-deductible donations for federal income tax purposes.

FINANCIAL

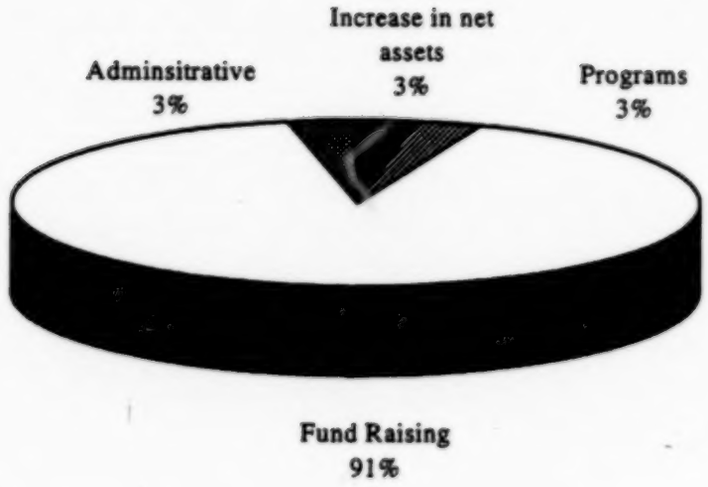
The following information is based on VietNow's IRS Form 990 for the fiscal year ended June 30, 2000:

Source of Funds

Direct public support	3,604,348
Other revenue	7,641
Membership dues and assessments	6,226
Interest on savings and temporary cash investments	3,860
Gross sales of inventory	2,214
Total Income	**$3,624,289**

Uses of Funds as a % of Total Income

This pie chart reflects the CBBB Standards addressing the use of funds which, in part, seek to identify how total income from all sources was applied by the charity. The item titled Increase in Net Assets shows the portion of income remaining after expenses.



Total Income	$3,624,289
Program Expenses	100,676
Fund Raising Expenses	3,286,348
Administrative Expenses	109,631
Total Expenses	($3,496,655)
Income in Excess of Expenses	127,634
Beginning Net Assets	382,876
Ending Net Assets	510,510
Total Liabilities	67,027
Total Assets	$577,537

Detailed information is on file with the BBB Wise Giving Alliance. An organization may change its practices at any time without notice. Donors must decide for themselves the significance of any variation from the CBBB Standards, taking into account the relative importance of the practice in question in the context of the organization's total performance.

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CBBB Standards for Charitable Solicitations

Introduction

The Council of Better Business Bureaus promulgates these standards to promote ethical practices by philanthropic organizations. The Council of Better Business Bureaus believes that adherence to these standards by soliciting organizations will inspire public confidence, further the growth of public participation in philanthropy, and advance the objectives of responsible private initiative and self-regulation.

Both the public and soliciting organizations will benefit from voluntary disclosure of an organization's activities, finances, fund raising practices, and governance - information that donors and prospective donors will reasonably wish to consider.

These standards apply to publicly soliciting organizations that are tax exempt under section 501(c)(3) of the Internal Revenue Code, and to other organizations conducting charitable solicitations.

While the Council of Better Business Bureaus and its member Better Business Bureaus generally do not report on schools, colleges, or churches soliciting within their congregations, they encourage all soliciting organizations to adhere to these standards. These standards were developed with professional and technical assistance from representatives of soliciting organizations, professional fund raising firms and associations, the accounting profession, corporate contributions officers, regulatory agencies, and the Better Business Bureau system. The Council of Better

Business Bureaus is solely responsible for the contents of these standards.

For The Purpose of These Standards:

1. "Charitable solicitations" (or "solicitations") is any direct or indirect request for money, property, credit, volunteer service or other thing of value, to be given now or on a deferred basis, on the representation that it will be used for charitable, educational, religious, benevolent, patriotic, civic, or other philanthropic purposes. Solicitations include invitations to voting membership and appeals to voting members when a contribution is a principal requirement for membership.

2. "Soliciting organizations" (or "organizations") is any corporation, trust, group, partnership or individual engaged in a charitable solicitation; a "solicitor" is anyone engaged in a charitable solicitation.

3. The "public" includes individuals, groups, associations, corporations, foundations, institutions, and/or government agencies.

4. "Fund raising" includes a charitable solicitation; the activities, representations and materials which are an integral part of the planning, creation, production and communication of the solicitation; and the collection of the money, property, or other thing of value requested. Fund raising includes but is not limited to donor acquisition and renewal, development, fund or resource development, member or membership development, and contract or grant procurement.

PUBLIC ACCOUNTABILITY

A1. Soliciting organizations shall provide on request an annual report.
The annual report, an annually-updated written account, shall present the organization's purposes; description of overall programs, activities and accomplishments; eligibility to receive deductible contributions; information about the governing body and structure; and information about financial activities and financial position.

A2. Soliciting organizations shall provide on request complete annual financial statements.
The financial statements shall present the overall financial activities and financial position of the organization, shall be prepared in accordance with generally accepted accounting principles and reporting practices, and shall include the auditor's or treasurer's report, notes and any supplementary schedules. When total annual income exceeds $100,000, the financial statements shall be audited in accordance with generally accepted auditing standards.

A3. Soliciting organizations' financial statements shall present adequate information to serve as a basis for informed decisions.
Information needed as a basis for informed decisions generally includes but is not limited to: a) significant categories of contributions and other income; b) expenses reported in categories corresponding to the descriptions of major programs and activities contained in the annual report, solicitations, and other informational materials; c) a detailed schedule of expenses by natural classification (e.g., salaries, employee benefits, occupancy, postage, etc.), presenting the natural expenses incurred for each major program and supporting activity; d) accurate presentation of all fund raising and administrative costs; and e) when a significant

activity combines fund raising and one or more other purposes (e.g., door-to-door canvassing combining fund raising and religious ministry, or a direct mail campaign combining fund raising and public education), the financial statements shall specify the total cost of the multi-purpose activity and the basis for allocating its costs.

A4. Organizations receiving a substantial portion of their income through the fund raising activities of controlled or affiliated entities shall provide on request an accounting of all income received by and fund raising costs incurred by such entities.
Such entities include committees, branches or chapters which are controlled by or affiliated with the benefiting organization and for which a primary activity is raising funds to support the programs of the benefiting organization.

USE OF FUNDS

B1. A reasonable percentage of total income from all sources shall be applied to programs and activities directly related to the purposes for which the organization exists.
A reasonable percentage requires that at least 50% of total income from all sources be spent on programs and activities directly related to the organization's purposes.

B2. A reasonable percentage of public contributions shall be applied to the programs and activities described in solicitations, in accordance with donor expectations.
A reasonable percentage requires that at least 50% of public contributions be spent on the programs and activities described in solicitations, in accordance with donor expectations;

B3. Fund raising costs shall be reasonable.

A reasonable use of funds requires that fund raising costs not exceed 35% of related contributions.

B4. Total fund raising and administrative costs shall be reasonable.
A reasonable use of funds requires that total fund raising and administrative costs not exceed 50% of total income.

An organization which does not meet one or more of these percentage limitations may provide evidence to demonstrate that its use of funds is reasonable. The higher fund raising and administrative costs of a newly created organization, donor restrictions on the use of funds, exceptional bequests, a stigma associated with a cause, and environment or political events beyond an organization's control are among the factors which may result in costs that are reasonable although they do not meet these percentage limitations.

B5. Soliciting organizations shall substantiate on request their application of funds, in accordance with donor expectations, to the programs and activities described in solicitations.

B6. Soliciting organizations shall establish and exercise adequate controls over disbursements.

SOLICITATIONS & INFORMATIONAL MATERIALS

C1. Solicitations and informational materials, distributed by any means, shall be accurate, truthful and not misleading, both in whole and in part.

C2. Soliciting organizations shall substantiate on request that solicitations and informational materials, distributed by any means, are accurate, truthful and not misleading, in whole and in part.

C3. Solicitations shall include a clear description of the programs and activities for which funds are requested.
Solicitations which describe an issue, problem, need or event, but which do not clearly describe the programs or activities for which funds are requested will not meet this standard. Solicitations in which time or space restrictions apply shall identify a source from which written information is available.

C4. Direct contact solicitations, including personal and telephone appeals, shall identify a) the solicitor and his/her relationship to the benefiting organization, b) the benefiting organization or cause and c) the programs and activities for which funds are requested.

C5. Solicitations in conjunction with the sale of goods, services or admissions shall identify at the point of solicitation a) the benefiting organization, b) a source from which written information is available and c) the actual or anticipated portion of the sales or admission price to benefit the charitable organization or cause.

FUND RAISING PRACTICES

D1. Soliciting organizations shall establish and exercise controls over fund raising activities conducted for their benefit by staff, volunteers, consultants, contractors, and controlled or affiliated entities, including commitment to writing of all fund raising contracts and agreements.

D2. Soliciting organizations shall establish and exercise adequate controls over contributions.

D3. Soliciting organizations shall honor donor requests for confidentiality and shall not publicize the identity of

donors without prior written permission.
Donor requests for confidentiality include but are not limited to requests that one's name not be used, exchanged, rented or sold.

D4. Fund raising shall be conducted without excessive pressure.
Excessive pressure in fund raising includes, but is not limited to, solicitations in the guise of invoices; harassment; intimidation or coercion, such as threats of public disclosure or economic retaliation; failure to inform recipients of unordered items that they are under no obligation to pay for or return; and strongly emotional appeals which distort the organization's activities or beneficiaries.

GOVERNANCE

E1. Soliciting organizations shall have an adequate governing structure.
Soliciting organizations shall have and operate in accordance with governing instruments (charter, articles of incorporation, bylaws, etc.) which set forth the organization's basic goals and purposes, and which define the organizational structure. The governing instruments shall define the body having final responsibility for and authority over the organization's policies and programs (including authority to amend the governing instruments), as well as any subordinate bodies to which specific responsibilities may be delegated.

An organization's governing structure shall be inadequate if any policy-making decisions of the governing body (board) or committee of board members having interim policy-making authority (executive committee) are made by fewer than three persons.

E2. Soliciting organizations shall have an active governing body.
An active governing body (board) exercises responsibility in establishing policies, retaining qualified executive leadership, and overseeing that leadership.

An active board meets formally at least three times annually, with meetings evenly spaced over the course of the year, and with a majority of the members in attendance (in person or by proxy) on average.

Because the public reasonably expects board members to participate personally in policy decisions, the governing body is not active, and a roster of board members may be misleading, if a majority of the board members attend no formal board meetings in person over the course of a year.

If the full board meets only once annually, there shall be at least two additional, evenly spaced meetings during the year of an executive committee of board members having interim policy-making authority, with a majority of its members present in person, on average.

E3. Soliciting organizations shall have an independent governing body.
Organizations whose directly and/or indirectly compensated board members constitute more than one-fifth (20%) of the total voting membership of the board or of the executive committee will not meet this standard. (The ordained clergy of a publicly soliciting church's policy-making governing body are excepted from this 20% limitation, although they may be salaried by or receive support or sustenance from the church.)

E4. Soliciting organizations shall have an independent governing body.

Organizations engaged in transactions in which board members have material conflicting interests resulting from any relationship or business affiliation will not meet this standard.

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